STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2001
v	No. 213424 Wayne Circuit Court
MICHAEL E. ESZ, Defendant-Appellant.	LC No. 98-002499

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803. The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to two to five years' imprisonment. Defendant appeals as of right. We reverse.

Defendant argues that his due process rights were violated because he did not receive adequate notice that he would have to defend against a charge of receiving and concealing stolen property where he was only charged with second-degree home invasion. We agree. Whether a defendant's rights to due process were violated is a constitutional question, which we review de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999).

A defendant may not be convicted of a crime with which he has not been charged unless he receives adequate notice. *People v James*, 142 Mich App 225, 227; 369 NW2d 216 (1985); *People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984). Notice is adequate if the offense of which the defendant is convicted is a lesser included offense of the original charge. *James, supra* at 227; *Quinn, supra* at 147. However, a defendant may not be convicted of a cognate lesser included offense unless the language of the charging document gives the defendant notice that he could face the lesser offense charge. *Quinn, supra* at 147. A cognate lesser included offense is one "that share[s] some common elements, and [is] of the same class or category as the greater offense, but h[as] some additional elements not found in the greater offense." *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999) quoting *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994).

In *People v Adams*, 202 Mich App 385, 391-392; 509 NW2d 530 (1993), this Court held that the defendant did not receive fair notice when he was originally charged with breaking and entering, but was ultimately convicted of receiving and concealing stolen property. In that case, the information charged the defendant with breaking and entering a building with intent to commit a larceny therein and did not allege that defendant possessed stolen goods after the alleged offense was committed or that the larceny had been successful. *Id*. at 389. This Court held that because the elements of the two offenses were dissimilar, the defendant did not receive adequate notice that he would have to defend against a receiving and concealing stolen property charge. *Id*. at 391-392.

In 1994, the breaking and entering statute, MCL 750.110; MSA 28.305, was amended to provide for the separate offense of home invasion, MCL 750.110a; MSA 28.305(a). *People v Warren*, 228 Mich App 336, 348 n 4; 578 NW2d 692 (1998), lv gtd on other grounds 460 Mich 851 (1999). By amending the statute, the Legislature effectively replaced the former offense of breaking and entering an occupied dwelling with intent to commit a felony or larceny therein with the more broadly defined offense of home invasion.[1] *Id*. at 352.

In this case, defendant was charged with second-degree home invasion under § 110a(3). The information alleged that defendant committed a breaking and entering or entering without permission of a certain dwelling house, with the intent to commit a larceny therein, but the information did not allege that defendant possessed stolen goods. As noted by this Court in *Adams, supra* at 390, the elements of the charged offense, second-degree home invasion, and the offense for which defendant was convicted, receiving and conceiving stolen property over $100, are different. Second-degree home invasion requires a showing that the defendant broke into and entered a dwelling with the intent to commit a larceny or felony therein, or entered a dwelling without permission with the intent to commit a felony or larceny therein. MCL 750.110a(3); MSA 28.305(a)(3) On the other hand, receiving and concealing stolen property in excess of $100 requires proof that (1) the property was stolen, (2) the property had a fair market value in excess of $100, (3) the defendant bought, received, possessed, or concealed the property, knowing that the property was stolen, and (4) the property was identified as stolen. MCL 750.535; MSA 28.803; *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). Thus, the only common thread between second-degree home invasion and the lesser offense of receiving and concealing stolen property is the possible existence of a larceny, however, second-degree home invasion does not require that the larceny be successful, only that defendant intended to commit a larceny when he broke and entered. *Adams, supra* at 390.

Further, the focus of a home invasion charge is on the events that preceded the larceny (i.e., what the defendant did in order to effectuate the planned larceny). In contrast, the focus of a receiving or concealing stolen property charge is on the facts that follow the larceny (i.e., whether the defendant obtained possession of stolen goods with knowledge that the goods were stolen). Thus, the facts to be emphasized at a trial for home invasion are substantially different from the facts that would be emphasized at a receiving and concealing stolen property trial. *Adams, supra*.

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[1] For purposes of the former breaking and entering statute, MCL 750.100; MSA 28.305, an "occupied dwelling" did not require the presence of an occupant at the time of the breaking and entering, rather, it was simply a dwelling which was habitually used as a place of abode.

Finally, the fact that defendant was not informed of the possibility of a conviction on the lesser charge of receiving and concealing stolen property at any time throughout trial, and only learned of this charge at the conclusion of the bench trial during the trial court's ruling, is significant. The trial court convicted defendant of the lesser offense on its own accord, without any mention of the lesser offense by either defendant or the prosecutor. Defendant was not afforded notice that he could face a lesser offense conviction in the charging document, *Adams, supra* at 389, nor was he informed of this possibility by the trial court or counsel throughout trial. Moreover, defendant was deprived of an opportunity to present evidence during trial or alter his theory of the case pertaining to that offense. Under these circumstances, defendant could not possibly have known that he would be called upon to defend a charge that was not raised until the verdict was announced. Therefore, we conclude that defendant did not receive adequate notice that he would have to defend against a receiving and concealing stolen property charge, *Adams, supra* at 391, and we reverse defendant's conviction.[2]

In light of our disposition of this issue, we need not decide the other issues raised by defendant on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

[2] The prosecutor is, of course, free to retry defendant for receiving and concealing stolen property after providing proper notice of the charge.